No. 87-1991

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ROY GUINNANE, GUINNANE CONSTRUCTION CO., INC.,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
ROBERT PASSMORE, AND ALEC BASH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

LOUISE H. RENNE
City Attorney
Counsel of Record

ANDREW W. SCHWARTZ
Deputy City Attorney
214 Van Ness Avenue
San Francisco, CA 94102
(415) 864-2036
Attorneys for Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

12 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

No. 87-1991

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ROY GUINNANE, GUINNANE CONSTRUCTION CO., INC.,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
ROBERT PASSMORE, AND ALEC BASH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

Respondents City and County of San Francisco, Robert Passmore, and Alec Bash ("the City") file this brief in opposition to the Petition for a Writ of Certiorari and pray that the Writ be denied. The California Court of Appeal has correctly determined that in this case there is neither a permanent nor a temporary taking of property requiring just compensation to petitioners.

STATEMENT OF THE CASE

There is no permanent taking in this case for a simple reason: The City has not denied petitioners any use of their property. As the undisputed facts show (*see* Opinion of Court of Appeal attached as Appendix A to Petition for Writ ("Opinion") at A-11), petitioners' original building permit application was cancelled in 1983 "due to [their] failure to submit the requested data." Opinion at A-3. Nearly three years later, on December 30, 1985, petitioners filed a second permit application. In Febru-

ary 1986, when the "city's motion for summary judgment came on for hearing . . . , [petitioners'] new building permit application had not yet been acted upon." Opinion at A-3. Accordingly, under recent decisions of this Court, the Court of Appeal correctly concluded that petitioners' permanent "taking" claim was not ripe for adjudication.

Even if the record showed that the City had denied petitioners' second building permit application, the denial would have stopped only one use of the property. As the Court of Appeal made clear, other uses of the property would still be available.

> The denial of plaintiff's application to build four 5-bedroom, 5-bath houses of 6,000 square feet each, if it has occurred, does not constitute a denial of all use of the land. The denial of an ability to exploit a property interest heretofore believed available for development is not a taking.

Opinion at A-7, n. 4. Petitioners have made no showing that the City has denied uses of the property for houses smaller than 6,000 square feet or for other less intense development.

Petitioners also failed to demonstrate a temporary taking compensable under *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. ____, 107 S.Ct. 2378 (1987) ("*First English*"). Petitioners did not establish that the City denied them all use of their property for any period beyond that required for the normal governmental decision-making process. *See First English*, 107 S.Ct at 2389. Indeed, as the Court of Appeal held, the undisputed facts show that petitioners—and not the City—were responsible for any unreasonable delays in processing their building permit application. Opinion at A-10.

Thus, petitioners have failed to satisfy the provisions of Supreme Court Rule 17.1 governing review on certiorari. Subsections (a) and (b) have no application here: This case involves no decision by a federal court of appeals, and petitioners do not contend that a state court of last resort has decided a federal question in a way that conflicts with decisions of either a federal court of appeals or another state court of last resort. The only remaining basis for review, Rule 17.1(c), is also inapplicable. The Court of Appeal's decision is fully consistent with the decisions of

this court in *First English* and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). This case is therefore unworthy of review.

To correct inaccuracies and omissions in petitioners' statement of the case, the City incorporates by reference the Factual Background in the Court of Appeal's Opinion, including the court's recitation of the "salient sequence of events" of the case. Opinion at A-10, n.6.

REASONS WHY THE PETITION SHOULD BE DENIED

THE COURT BELOW CORRECTLY DECIDED THAT *FIRST ENGLISH* DOES NOT APPLY BECAUSE PETITIONERS FAILED TO ESTABLISH A COMPENSABLE TAKING

First English overruled the holding in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), disallowing money damages for a "taking" resulting from excessive governmental regulation. However, *First English* changed only the *remedy* for a taking. 107 S.Ct. at 2388. It did not change the standard of *liability* for a taking. 107 S.Ct. at 2384-2385. *First English* follows the well established doctrine that a taking occurs only when government action deprives the owner of *all* viable economic use of his property:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of his property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact taking regulations. These questions, of course, remain open for decision on the remand we direct today.

First English, 107 S.Ct. at 2384-2385 (footnote and citations omitted); *accord, Penn Central Transp. Co. v. New York City, supra*, 438 U.S. at 130-131; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Consistent with this holding, in this case the Court of Appeal stated:

> Although the Supreme Court has determined that a temporary regulatory taking is compensable, there is nothing in *First English* which changes the rule that a "taking" must occur before compensation may be claimed.

Opinion at page A-6. Here, the Court of Appeal separately analyzed and rejected petitioners' claims that a permanent and a temporary taking had occurred. Each ruling was correct.

A

BECAUSE THE CITY HAD NOT ACTED ON PETITIONERS' BUILDING PERMIT APPLICATION AT THE TIME SUMMARY JUDGMENT WAS ENTERED, PETITIONERS' CLAIM FOR A PERMANENT TAKING IS NOT RIPE

With respect to a permanent taking, petitioners argue that the Court of Appeal's decision was based on its finding that petitioners were not deprived of their right to sell the property or to exclude others from it. Petition at 6-7, referring to Opinion at A-7. In fact, the Court of Appeal based its decision on petitioners' failure to demonstrate any denial of all use of their property. Petitioners have the burden of showing that the government's regulation effected such a denial. *See First English*, 107 S.Ct. at 2384.

The uncontested facts support the Court of Appeal's ruling. Petitioners originally sought a building permit for the subject property in September 1980. The permit was cancelled in May 1983 as a result of petitioners' inaction. *See* Opinion at A-3. Petitioners waited to file a second building permit application until December 30, 1985. As of February 4, 1986, the date summary judgment was entered for the City, petitioners' second building permit application had been on file for only five weeks and *was still pending*. Therefore, on the record at the time of the summary judgment ruling, the trial court correctly held that the

City had not denied petitioners any use of their property. Opinion at A-7, 8.

The Court of Appeal correctly based its holding that petitioners' taking claim was premature on authority from this Court. Opinion at A-7. In *First English*, this Court discussed cases like this one in which the taking issue was not ripe.

> Concerns with finality left us unable to reach the remedial question in the earlier cases where we had been asked to consider the rule of *Agins*. *See MacDonald, Sommer & Frates, supra*, 477 U.S., at ____; (summarizing cases). In each of these cases, we concluded either that the regulations considered to be in issue by the state court did not effect a taking, *Agins v. Tiburon, supra*, 24 Cal.3d, at 263, or that the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred. *MacDonald, Sommer & Frates, supra*, 477 U.S., at ____; *Williamson County, supra*, 473 U.S., at ____; *San Diego Gas & Electric Co., supra*, 450 U.S., at 631-632. Consideration of the remedial question in those circumstances, we concluded, would be premature.

107 S.Ct. at 2383.

In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. ____, 106 S.Ct. 2561 (1986), this Court squarely held that a taking claim is premature where the government has not made a final decision rejecting a development plan and denying a variance. *Williamson*, 473 U.S. at 191-193; *MacDonald*, 106 S.Ct. at 2568. In this case, the record uniquivocally shows that the City had not made a final decision.

Even if petitioners' taking claim were ripe, it would fail. Petitioners claim is that the City's permit requirements and requirements for environmental information under California's Environmental Quality Act ("CEQA"), California Public Resources Code §§ 21000 *et seq.*, were so onerous that they effectively precluded development. With respect to the City's permit process, it is clear that requiring a developer to undergo such a permitting process before proceeding with development is not a

taking. As this Court declared in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985):

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

On the record in this case, petitioners have shown neither that a permit was denied or that they were prevented from making any economically viable use of the land in question.

With respect to the City's requirements for environmental information, petitioners' claim fails under the substantive test of *Penn Central, supra.* Under that test, courts examine three factors: (1) the extent to which the government action interferes with reasonable, investment-backed expectations; (2) the economic impact of the government regulation; and (3) the character of the government action, *i.e.*, whether there is a physical invasion. 438 U.S. at 124; *see also MacDonald, Sommer & Frates v. Yolo County, supra*, 106 S.Ct. at 2566.

As to the first factor, petitioners had no reasonable investment-backed expectation that the City would not require environmental information to satisfy CEQA before permitting development. A reasonable expectation "must be more than a 'unilateral expectation or an abstract need.' " *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). The City's environmental review process has been mandatory under state law for 17 years. *See No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 83-84 (1974); *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 254 (1972). Petitioners have presented no evidence or authority that the state-mandated requirements for environmental information were unexpected, unreasonable, or excessive.

As to the second factor, the economic impact of the City's requirement that petitioners supply environmental information was nil. Petitioners still own exactly what they bought, and own it at a greatly enhanced value. Petitioners purchased the property for $210,000 in 1979, and petitioners' expert valued the property at $1,500,000 in 1985 assuming that the property could be developed. Opinion at A-7, n. 3. Thus, the only evidence in the record is that the value of petitioners' property *increased* over 600 percent.*

As to the third factor, the City did not physically invade petitioners' property. Rather, any interference with petitioners' free use of the property arose from CEQA. The mere fact that state law requires petitioners to supply environmental information before their permit could be processed is not sufficient to establish a taking:

> [T]he denial of one traditional property right does not always amount to a taking. . . . [W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Andrus v. Allard, 444 U.S. 51, 65-66 (1979). CEQA is a burden "we all must bear in exchange for 'the advantage of living and doing business in a civilized community.' " *Id.*, at 67.

Finally, petitioners' claim that the demands for environmental information were impossible to satisfy is completely undercut by the record. The evidence shows that petitioners ultimately provided all the necessary information, and that the environmental review process was completed nearly five months before the trial court ruled in this matter.

The lower court's decision turns on the peculiar facts of this case and is consistent with a long line of authorities of this Court. Therefore, the petition should be denied.

---

* In contrast, the record in the court below demonstrates that petitioners' total cost for environmental review of their project was only $18,200. Clerk's Transcript 812-813, 826-827, 833, 834, 839, 841-842, 867.

B

BECAUSE THE UNDISPUTED FACTS SHOW THAT PETITIONERS WERE RESPONSIBLE FOR ANY DELAY IN PROCESSING THEIR BUILDING PERMIT APPLICATION, THE CITY DID NOT TEMPORARILY TAKE PETITIONERS' PROPERTY

During the period July 1980 to July 1981, the City designated petitioners' property as "open space" in its Master Plan. Petitioners allege that "all acknowledge" that they could not develop their property during this one-year period. Petition at 9. On the contrary, the City does not agree with this assertion and the Court of Appeal did not so hold.

Indeed, California law does not support petitioners' claim. Designation of property as open space in a city's master plan means merely that the city intends to study acquisition of the property for open space. The City's open space Master Plan designation of petitioners' property did not prevent its development. California cases establish that development of property may proceed despite such designation. *See Verdugo Woodlands Homeowners, etc. Assn. v. City of Glendale*, 179 Cal.App.3d 696, 704 (1986) (charter city is free to permit development not in conformance with master plan); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120 (1973) (adoption of a master plan amendment is for planning purposes only and does not interfere with development).

Even if the one-year open space designation did preclude development, the Court of Appeal correctly concluded that any "interim delay which occurred herein while the City studied the possible acquisition of plaintiff's property as an open space area" was a "*normal delay* in obtaining [a] building permit." Opinion at A-9; emphasis added. *First English* makes clear that such normal delays cannot constitute a taking. 107 S.Ct. at 2389.

Moreover, even assuming *arguendo* that the one-year open space designation was not a "normal delay," petitioners' claim would fail; the one-year wait did not prejudice petitioners because even after it expired, they then delayed for more than three years

in completing environmental review. As the Court of Appeal stated:

> Notwithstanding city's repeated requests for the essential information, some three and one-half years expired before plaintiff submitted the final item of information (the site survey) in September 1985.

Opinion at A-10, n. 6. The following month, the City completed the environmental review process. *Id.* Because completion of environmental review is a prerequisite to issuance of a building permit under California law, the City was not the legal cause of any alleged delay in the City's issuing a building permit. California Public Resources Code § 21001.1; California Administrative Code §§ 15074(b), 15091(a), 15092; *No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at 84. It was petitioners' "own conduct and inaction," not the City's, which was the legal cause of any excessive delay in formal action on petitioners' building permit. Opinion at A-10.

CONCLUSION

The record establishes that there was neither a permanent nor a temporary taking in this case. The petition for a writ of certiorari should be denied.

Dated: August 31, 1988

Respectfully submitted,

LOUISE H. RENNE
City Attorney
Counsel of Record

ANDREW W. SCHWARTZ
Deputy City Attorney

By ANDREW W. SCHWARTZ
Counsel for Respondents